

No. 324

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IN THE  
Supreme Court of the United States

October Term, 1957

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LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS,  
AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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On Writ of Certiorari to the United States Court of Appeals  
For the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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**OPINIONS BELOW**

The opinion of the court below (R. 195-204) is reported at 247 F. 2d 71. The National Labor Relations Board's opinion (R. 63-67, 26-61) is reported in the Official Reports of that agency and appears at 115 NLRB 800.

## JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 and under Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. Section 160(e). The Judgment of the court below (R. 205-206) was entered on May 9, 1957, and its decree (R. 206-208) issued on June 7, 1957. The writ of certiorari was granted on October 14, (R. 209).

## STATUTE INVOLVED

The statutory provision involved is Section 8(b) (4) (A) of the National Labor Relations Act, as amended. (61 Stat. 136, 29 U.S.C. 151 *et seq.*), which states:

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

\* \* \* \* \*

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; \* \* \*

## QUESTIONS PRESENTED

1. Whether the settlement of underlying dispute, which gave rise to the alleged violation of Section 8

(b)(4)(A) of the Act, prior to the issuance of the complaint by the General Counsel of the Board rendered this case moot?

2. Whether the "hot cargo" clause in the Teamsters' contracts with the carriers eliminated the elements necessary for a finding of a violation of Section 8(b)(4)(A) by the Petitioner?

## STATEMENT

### A. Facts

On September 15, 1954, the Petitioner, the bargaining representative of the production and maintenance employees of the American Iron and Machine Works Company, called a lawful strike to enforce its economic demands (R. 31). During the strike it became necessary for the employer to deliver its freight to the common carriers' docks by means of its own vehicles (R. 32). The Petitioner's pickets followed the Company's vehicles which, except on one occasion, bore the identification markings of American Iron when deliveries were made to the docks of the common carriers.<sup>1</sup> Upon arrival at destination these vehicles were picketed in a "U" shaped path while they remained at those premises (R. 104). When the Company's vehicles left the premises of the common carriers, the pickets also left.

General Drivers, Chauffeurs, Warehousemen and Helpers Union Local 886; AFL-CIO, (Respondent in Case No. 273) hereinafter called the Teamsters, was the collective bargaining representative of the

<sup>1</sup> Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines.

employees of the common carriers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41-42; 140, 187):

#### ARTICLE 4

(b) Members of the union shall not be allowed to handle or to haul freight to or from an unfair company, provided this is not in violation of the Labor-Management Relations Act of 1947."

Because of this clause, on occasions when American Iron trucks appeared at the loading platform to unload American Iron products for shipment, the Teamsters induced its members employed by the carriers on the loading platforms to comply with that clause in the contract by refraining from unloading the trucks.

On September 24, 1954, American Iron filed with the Regional Director for the Sixteenth Region of the National Labor Relations Board separate unfair labor practice charges alleging that the Petitioner and the Teamsters had violated Section 8(b)(4)(A) of the National Labor Relations Act. Prior to the issuance of the complaint in those cases, the Regional Director petitioned the United States District Court for the Western District of Oklahoma for a temporary injunction enjoining both Unions from engaging in certain acts alleged to be violations of Section 8(b)(4)(A) of the National Labor Relations Act (Civil Case No. 6428, unreported). On October 16, 1954, after a hearing before that court, the petition for injunction was dismissed on the grounds that the "hot cargo" clause in the Teamsters' agreement was a valid defense to the alleged violation of Section 8(b)(4)(A) of the Act by either Union. Thereafter,

on October 21, 1954, American Iron and the Petitioner signed a collective bargaining agreement (R. 31) thereby settling the dispute and as of that date all picketing ceased. Two days later, on October 23, 1954, the General Counsel of the National Labor Relations Board issued complaints based upon the charges filed by American Iron (R. 2-8, 11-15).

#### **B. The Board's Conclusions and Order**

The National Labor Relations Board, with two members dissenting, found that the Petitioner had violated Section 8(b)(4)(A) of the Act by picketing the vehicles of American Iron at the docks of the common carriers and by oral appeals to the employees of the common carriers to cease handling the goods of American Iron, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. However, four members of the Board agreed that this clause was not contrary to public policy. The two dissenting members found that neither union had violated Section 8(b)(4)(A) of the Act. The dissenters reasoned that the "hot cargo" clause, found by four members to be valid, excepted the handling of "hot cargo" from the scope of employment; that the carriers had consented in advance that its handling was not a part of the required duties of the employees; and, accordingly, the employer having agreed, inducement of the employees to conform with that agreement was not inducement of either a strike or of a concerted refusal to work in the course of their employment.

The Board also found that the controversy was not moot although the dispute had terminated in its entirety prior to the issuance of the original complaint in this matter (R. 86-87).

The Board entered an order requiring the Petitioner and the Teamsters to cease and desist from the unfair labor practices found and to post appropriate notices (R. 65-67), and from that order the Petitioner appealed.

### C. The Decision of the Court Below

The court below (with one Judge dissenting on each part of the case) set aside the Board's order against the Teamsters and enforced the Board's order against the Petitioner (R. 195-204). The court unanimously held that the "hot cargo" clause was valid. A majority, Judge Prettyman dissenting, held that this clause removed elements essential to the finding of a violation of Section 8(b)(4)(A). They reasoned that there could be neither a strike or a refusal to work, nor a forcing or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the occurrence. Therefore, they concluded, the Teamsters' enforcement of its "hot cargo" agreements was not in violation of Section 8(b)(4)(A). However, a different majority, Judge Washington dissenting, concluded that the Petitioner's conduct did violate Section 8(b)(4)(A) of the Act, upon the ground that the Petitioner could not rely upon the "hot cargo" clauses because it was not the contracting union. Judge Washington dissented from this view upon the ground that the "operative effect of the employer's consent is . . . the same regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it"; for, whether the inducement is by the Teamsters or the Petitioner, "what is being induced is not a 'strike or refusal to work' with an object of 'forcing' or 'requiring' an employer to cease doing business with another person

within the meaning of Section 8(b)(4)(A)" (R. 204). The court also found that the Petitioner's defense of mootness was without merit.

## SUMMARY OF ARGUMENT

### I

The court below and the Board erred in not finding that the case was rendered moot by complete settlement of the underlying dispute which gave rise to the alleged unfair labor practices. This court has recognized that causes of action may become moot and in *Local 74, United Brotherhood of Carpenters and Joiners, AFL v. National Labor Relations Board*, 341 U.S. 707, 715, indicated that if the underlying dispute is settled, a cause alleging a violation of Section 8(b)(4)(A) will be considered by this court as moot. Therefore, since the underlying dispute was settled prior to the issuance of the complaint in this case the cause of action was rendered moot.

### II

Assuming the legality of the "hot cargo" clause in the Teamster-common carrier agreements and the enforceability of that clause by direct inducement by the Teamsters of the common carriers employees, this defense is equally available to the Petitioner. The clause removes from the course of employment of the common carriers' employees the necessity of working on hot cargo, and it also negates the view that the object of the activity is forcing or requiring a cessation of business between the contracting employer and others, since the contracting employer had consented in advance to that cessation. Therefore, the necessary elements to a finding of a violation of Section 8(b)(4)(A) are missing.

## ARGUMENT

### I

#### THE CONTROVERSY WAS RENDERED MOOT BY A COMPLETE SETTLEMENT OF THE UNDERLYING DISPUTE PRIOR TO THE ISSUANCE OF THE COMPLAINT

The charges initiating the Board's proceedings in this case were filed on September 23 and 24, 1954 (R. 2, 11). Preliminary injunctive relief under Section 10(I) of the Act was denied by the District Court on October 16, 1954 (R. 68). Thereafter, on October 21, 1954, the Petitioner and American Iron signed a collective bargaining agreement for a period of two years (R. 188-190), thereby completely settling the underlying dispute. As of the date the agreement was signed, all picketing ceased (R. 31). The agreement contained a "no strike" clause (R. 188-189), which prohibited the Petitioner from participating in a strike or any concerted activity during the period of the agreement.

Despite the complete settlement of the underlying dispute, and though the possibility of a recurrence of the picketing was prohibited by the agreement, the General Counsel of the National Labor Relations Board nevertheless issued a complaint in these proceedings on October 23, 1954, two days after termination of the controversy (R. 11-15). The Board entertained the proceeding, stating only that the "voluntary cessation of unfair labor practices or private agreements for their end do not deprive the Board of its power to add the sanction of a Board Order and possibly enforcement proceedings in order to bar any recurrence of those practices" (R. 31).

The Board in its brief repeats the bromide, adding a few flourishes concerning the hypothetical "pos-

sibility" of recurrence of the conduct (p. 62). At no stage was there a genuine evaluation of the need for relief, the Board merely exercising the power because it may exist.

In the context of injunctive relief—which is what an administrative cease-and-desist order is—a case is moot in the absence of a "necessary determination that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633. It is this distinction that the Board failed to apprehend or apply. It assumed that because there was no corpse to be buried that for that reason there was a patient to be ministered.

Thus, the complaint was issued two days after the termination of the dispute, and the order eighteen months later. There was no showing of any recurrence in the interim, nor is there any now although the matter is well over three years old. And there is no reasonable basis for a claim that this was not foreseeable from the outset. The order is confined to a cessation of "doing business with American Iron and Machine Works Company" (R. 65). But Petitioner's controversy with that Company was terminated two days before the complaint issued with a collective bargaining agreement containing a no-strike clause. So here the "underlying dispute . . . [had] been shown to have been resolved." *Local 74, United Brotherhood of Carpenters v. National Labor Relations Board*, 341 U.S. 707, 715. And no case cited by the Board deals, as here, with a situation where the underlying dispute has been resolved *before* the issuance of the administrative complaint. The Board rests

merely upon a prophecy as to future conditions" (*United States v. Hamburg American Co.*, 239 U.S. 466, 475), a conjecture that Petitioner "will desire to renew [its] . . . claim to picket" in the speculative event of another strike at American Iron in the indeterminate future (*Benz v. Compania Naviera Hidalgo*, 205 F.2d 944, 946 (C.A. 9), cert. denied, 346 U.S. 885). That is not enough.

## II

### IF THE "HOT CARGO" CLAUSE PRIVILEGED THE TEAMSTERS' INDUCEMENT OF THE CARRIER EMPLOYEES, IT ALSO IMMUNIZED THE MACHINISTS' INDUCEMENT OF THOSE EMPLOYEES

Assuming that the Teamsters' inducement of the motor carrier employees was not in violation of Section 8(b)(4)(A) because of the "hot cargo" clause in the carriers' contracts with the Teamsters,<sup>2</sup> it follows that the clause also privileges Petitioner's inducement of those employees. The carriers agreed that their employees would be prohibited from handling freight from a struck company. Therefore, when the employees refused to handle the freight of American Iron they were complying with the collective bargaining agreement and, as the court below correctly held, this was not a "strike" or "refusal" to work, and there was no "forcing" or "requiring" of an employer to cease doing business with another person. See also *Rabouin v. National Labor Relations Board*, 195 F.2d 906, 912 (C.A. 2); *Milk Drivers and Dairy Employees Local Union No. 338 v. National Labor Relations Board*, 245 F.2d 817,

<sup>2</sup> The Petitioner in this case relies upon the arguments presented to the Court by the Respondent in Case No. 273 in respect to this point and therefore will not burden the court with additional argument.

822 (C.A. 2); *Douds v. Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herland's J.), 33 Labor Cases Para. 70,984; and *Madden v. Teamsters*, 114 F. Supp. 932, 938 (W.D. Wis.).

The only question that remains is whether Petitioner may not rely upon the Teamsters' "hot cargo" clause because it is not the contracting union. A majority of the Board did not pass upon this question because they found that the "hot cargo" clause was not available to the Teamsters and therefore was not available to the Petitioner (R. 65). However, the dissenting opinion in regard to this subject stated (R. 71-72):

"... we would dismiss this complaint in its entirety with regard to both the Teamsters and the Machinists. Although the latter union was not a party to the contract, this circumstance is irrelevant in determining whether employees have been induced by the Machinists to engage in a strike or concerted refusal to work within the meaning of Section 8(b)(4)(A). If the failure of employees to handle hot goods is not considered a strike or concerted refusal in the course of their employment, to handle the goods of another employer because it is excluded from the scope of their employment by contract, it would seem to follow that the inducement of them not to handle such goods, whether or not such inducement is by the union which is a party to the "hot cargo" agreement, is not violative of Section 8(b)(4)(A). In other words, as the parties to the contract have by contract excluded the handling of "hot goods" from the required duties of the employees covered by the contract the inducement of the employees by a union not a party to the contract not to do something that they are not required to do and which indeed is outside the scope of their employment would appear to be no more a violation of the Act than would such inducement by their own

union. As a matter of fact, in this case it seems clear that the parties to the contract intended to exclude the handling of hot cargo from the employees' scope of employment for the "hot cargo" clause provides that

Members of the Union shall not be *allowed* to handle or haul freight to or from an unfair company, . . . [Emphasis supplied.]

This language may be construed as constituting the refusal to handle hot cargo as more of a *duty* than a privilege. That is, it expressly prohibits such activity and therefore may be considered as imposing a duty upon the employees not to handle hot cargo. How can it be held that another union that requested the employees covered by such a contract not to do that which they are *prohibited* by contract from doing, thereby has violated the law?"

Three courts have passed on the precise question of whether a non-contracting union can use the "hot cargo" clause of the contracting union. The court below, by a divided vote, held that it was not available. On the other hand, the United States District Court for the Western District of Oklahoma (Civil Case No. 6428, Unreported), in the 10(1) proceeding in this case, took the contrary view and held that it was available. In *Douds v. Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herlands, J.), 33 Labor Cases Para. 70,984, an intermediate position was taken to the effect that the "hot cargo" clause was available to the non-contracting union after the contracting union had agreed to invoke such clause.

The heart of the issue was succinctly put by Judge

Washington in his dissenting opinion below. He stated (R. 203-204):

“It is true that the Machinists are not a party to the contract which contains the ‘hot cargo’ clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists’ conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a ‘strike or refusal to work’ with an object of ‘forcing’ or ‘requiring’ an employer to cease doing business with another person within the meaning of Section 8(b)(4)(A). This being so, I cannot agree that what is being induced is within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employers’ consent is, in my view, the same regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it.”

Although the Petitioner may not be a third-party beneficiary to the ‘hot cargo’ clause contained in the Teamsters’ agreement in a conventional contract sense, the Petitioner is certainly an intended beneficiary of the ‘hot cargo’ clause in a realistic labor relations sense. It is evident that ‘hot cargo’ clauses exist for the very purpose of assisting other unions which for one reason or another have labor disputes

with their respective employers. The Teamsters negotiated these "hot cargo" clauses to benefit either other Teamster locals or other labor organizations and, in fact, their primary purpose is to allow the Teamster members to assist other unions. The carriers were well aware when agreeing to the "hot cargo" clauses that they were consenting in advance that their employees would not be required to handle "hot" or "struck" goods regardless of the ownership of such goods; the carriers, in essence, consented in advance to their employees' refusal to handle goods from such employers as American Iron when they were in the throes of a strike. Accordingly, by picketing American Iron vehicles at the common carriers' docks, the pickets of the Petitioner notified the common carriers' employees that the goods they were handling were "hot goods". At that point, the common carriers' employees, knowing that these goods were "hot" or "struck", also knew they were not allowed to handle this work. It follows that after such notification of the status of American Iron's goods, the handling of it was removed from the course of the employment. Accordingly, there could be no violation of Section 8(b)(4)(A) by Petitioner since the elements necessary to a finding of such violation were not in existence, namely, there was no strike or concerted refusal to handle such goods within the course of the secondary employees' employment, and no forcing or requiring the cessation of business with American Iron, since the carriers had in advance agreed to that cessation.

The Respondent in its brief (p. 58) cites *Douds v. Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herland's J.),

in which the court found that a union other than the contracting union, in the circumstances of that case, had no right to rely upon the "hot cargo" clause. The court stated in that case that the secondary employees and their union must be protected against intermeddlers. However, as pointed out previously, the Petitioner in this case is not an intermeddler because the "hot cargo" clause was for the benefit of the Petitioner and other unions when they were engaged in a strike or concerted activity against an employer using the services of the various common carriers. Further, the "hot cargo" clause in the *Doubs* case gave the option to the union and its members to refuse to handle unfair goods, while the clause in this case prohibited the members of the union from handling unfair goods. Therefore, the handling of such goods was removed from the course of the secondary employees' employment without the need of the exercise of any option on the part of the contracting union. Finally, all that Judge Herland found was that before a noncontracting union could rely upon the "hot cargo" clause, there need be a showing that the contracting union agreed to invoke the clause. Such agreement is clearly shown by the record in this case. Both the Petitioner and the Teamsters were in complete accord in their common desire to invoke the "hot cargo" clause.

**CONCLUSION**

For the reasons stated, the judgment of the court below should be reversed and the cause remanded with directions to set aside the Board's Order.

Respectfully submitted,

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